THE FINANCIAL SERVICES ROUNDTABLE

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Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, DC 20551
Attention: Docket Nos. R-1167, R-1168, R-1169, R-1170 and R-1171

Re: Proposed Disclosure Rules Under Consumer Protection Regulations

Dear Sir or Madam:

The Financial Services Roundtable (the "Roundtable") is a national association that represents 100 of the largest integrated financial services companies providing banking, insurance, investment products, and other financial services. The member companies of the Roundtable appreciate the opportunity to comment to the Board of Governors of the Federal Reserve System (the "Board") on the proposed rules to establish more uniform standards for providing disclosures under five consumer protection regulations: B (Equal Credit Opportunity); E (Electronic Fund Transfers); M (Consumer Leasing); Z (Truth in Lending); and DD (Truth in Savings), (collectively, the "Five Regulations").

Background

The proposed rules attempt to provide a more specific definition for "clear and conspicuous" and include examples of how to meet the standard. The proposed rules would establish a uniform standard for "clear and conspicuous" disclosures using the definition for "clear and conspicuous" outlined in Regulation P (Privacy of Consumer Financial Information) as a model. The purpose of the proposed rules is to help ensure that consumers receive "noticeable and understandable" information required by law in connection with obtaining consumer financial products and services, and to help facilitate compliance through consistency among the Five Regulations.

The Roundtable appreciates the Board's attempt to create uniform standards and consistency among the Five Regulations and we support the goal of providing "clear and conspicuous" disclosures to consumers. However, we believe the proposed rules would have unintended consequences that would significantly and negatively affect the financial services industry. The member companies of the Roundtable oppose the proposed rules for the numerous reasons set forth below.

- The Roundtable believes the proposed "clear and conspicuous" standard is inappropriately modeled after Regulation P, which only requires a uniform, stand-alone disclosure of privacy policies that does not vary according to the type of transaction involved. The initial, annual, and revised privacy notices are all required to contain the same information – and none of that information is transaction-specific. The disclosures required under the Five Regulations are varied and complex. They vary according to the type of transactions involved and many are transaction-specific. They cannot be pre-printed in a uniform format. What is "clear and conspicuous" within the four corners of one stand-alone policy document is not the same as what is "clear and conspicuous" within the context of advertisements, applications, application disclosures, initial disclosures, closing statements, periodic statements, contracts and mortgages, and numerous state-required disclosures. This proposal fails to account for these variations and fails to provide the flexibility needed to address the variety and complexity of disclosures required under the Five Regulations.

- We specifically oppose the second component of the proposed standard, "designed to call attention to the nature and significance of the information in the disclosure". This new standard adds three new elements to "clear and conspicuous." Disclosures must be affirmatively designed to call attention to required disclosures – rather than just being clear and conspicuous. The designs must call attention to the nature of the disclosures – rather than just to the disclosures themselves. And, the designs must call attention to the significance of the disclosures – rather than just to the disclosures themselves. This new standard goes well beyond the stated purpose of the proposal and will require financial institutions to take many additional and astronomically costly steps in order to comply.

- The proposed rules would cause a serious hardship for financial institutions and would not benefit the consumer. Financial institutions would be faced with enormous costs to ensure each and every required disclosure meets the new standard. These costs would include significantly increased, ongoing compliance burdens placed upon institutions that will struggle to ensure continued compliance. In addition, institutions would be subject to severe scrutiny and potential civil liability as the limits of the new standard and creditors' compliance would be tested in court.

For these reasons, the Roundtable strongly urges the Board to withdraw the proposed rules. If the Board chooses to proceed with this rulemaking process, the Roundtable member companies request another opportunity for public comment.

The definition of "clear and conspicuous" in Regulation P is an inappropriate model to apply to all consumer protection regulations

The Board is proposing to amend the Five Regulations by using the definition of "clear and conspicuous" that exists in Regulation P. Regulation P defines the "clear and conspicuous" standard, as directed by the Gramm-Leach-Bliley Act, as "reasonably understandable and designed to call attention to the nature and significance of the information in the [disclosure]."[1] Furthermore, the Board proposes to add several "examples" to the commentaries for the Regulations to demonstrate how institutions can meet this standard. The Roundtable believes that the proposed use of the Regulation P "clear and conspicuous" standard and the corresponding compliance examples are inappropriate as applied to the Five Regulations.

First of all, as noted above, the proposed use of the Regulation P model is inappropriate because Regulation P requires a single, uniform, stand-alone disclosure of privacy policies that do not vary according to the type of transaction involved. What is "clear and conspicuous" within the four corners of one, stand-alone document is not the same as what is "clear and conspicuous" within the context of transactions that involve many integrated and complementary documents, such as: advertisements and solicitations, applications, application disclosures, good faith estimates, initial disclosures, closing statements, periodic statements, contracts and mortgages, and numerous state-required disclosures – not to mention that many of the required disclosures contain financial information that is transaction-specific. This proposal fails to provide for these variations and fails to provide the flexibility needed to address the variety and complexity of disclosures required under the Five Regulations.

Using headings, boldface or italics, and other enumerated formatting devices to call attention to every disclosure would disrupt the flow of the text, distort the emphasis of the materials communicated, and distract the reader from the most important information. Some examples include:

- Regulation E, DD and Z apply to product advertisements, periodic statements, and a broad array of other situations concerning financial products. These disclosures need to be noticeable, but they often would be less informative and meaningful by separately calling attention both to the nature and to the significance of the information in the disclosure rather than by closely integrating them with contract terms that would aid in determining their meaning.

  More specifically, making Regulation Z disclosures stand out would be extremely difficult - if not impossible or impractical - in conjunction with certain state law requirements. The Unruh Act (California Retail Installment Sales Act), for example, requires that the entire sales contract, including contract terms,

[1] 68 Fed. Reg 68,786 (Dec. 10, 2003); 12 C.F.R. § 216.3(b)(1).

applicable state law disclosures, and "disclosures required under Regulation Z," be "contained in a single document." Some of these California law disclosures must be in 12-point boldface and 14-point boldface type. The only way that an institution could be assured of calling attention to the Regulation Z disclosures would be to make them standout in, for instance, 14-point red boldface type or 16-point boldface type. This problem is further exacerbated by the fact that certain Regulation Z disclosures, such as Annual Percentage Rate and Finance Charge, must be more conspicuous than other Regulation Z disclosures when used with a corresponding rate or amount. The net result is that the contract would have several different levels of disclosures on a lengthy, single paper form - perhaps as long as 8½" by 18" to accommodate all of the required provisions and disclosures.

- Headings in card agreements are currently designed to identify major issues of interest to customers. To qualify for a safe harbor under the proposed rule, financial institutions would have to add headings for even relatively minor Truth in Lending Act disclosures. It is unclear whether retaining headings for non-required items—even for terms that are critically important from a consumer's perspective, such as minimum payment requirements and credit limits—would negate the requirement to "call attention" to required disclosures. Even if emphasizing non-required disclosures is not a violation of the proposed rules, however, the net result will simply be more information that would make it harder for customers to understand the disclosures.

- Financial institutions have already increased the type size of their "Schumer boxes" to 11- or 12-point type to obtain a safe harbor under earlier Board regulations. Because the proposed rule uses the same type size language with regard to all required disclosures, financial institutions would feel obligated to apply the same standards across the board. This would be very costly, and, more importantly, would result in decreasing the relative significance of the Schumer box even though it is the item most likely to be read by consumers.

Having key words and disclosures placed in italics or boldface may help a customer navigate through large amounts of text in documents such as a Regulation P privacy notice. However, highlighting every required element in a disclosure would make the forms difficult to read and may cause confusion among customers who do not understand why some items are emphasized and others are not. The application of Regulation P's disclosure standard in the Board's proposal does not account for the integration of disclosures with other information. This standard does not provide institutions with the flexibility they need to explain these disclosures and present them in an understandable format.

Second, the proposed use of the Regulation P model is inappropriate in light of the fact that the Board and the other federal banking agencies, as well as the Federal Trade Commission, the Commodity Futures Trading Commission, and the Securities and Exchange Commission (collectively, the "Agencies") recently published an advance

notice of proposed rulemaking ("ANPR") requesting public comment on ways to improve the privacy notices provided to consumers by financial institutions.[2] The Agencies are seeking comment on issues associated with the format, elements, and language used in privacy notices. In light of the fact that the Agencies are currently considering changes to the format of the privacy notices, it would be premature and inappropriate for the Board to adopt the Regulation P "clear and conspicuous" standard and "examples" for the Regulations.

In addition, we believe that the congressional process is a more appropriate mechanism for examining the impact of changing the legal standard for consumer disclosures. For example, the proposed rule could conflict with current congressional efforts to address certain statutory legal standards for consumer disclosures. A bankruptcy reform bill is pending on the floors of both the House and Senate that would alter several legal requirements on consumer disclosures. This bill contains several provisions that would require the Board to issue disclosure rules regarding minimum payments, introductory rates, late fees, and other topics.

Third, in the Five Regulations, "clear and conspicuous" is defined currently as "reasonably (or "readily") understandable." The standard in the proposed rules add a new element to this definition. The proposed definition of "clear and conspicuous" is "reasonably understandable *and designed to call attention to the nature and significance of the information in the disclosure*." (emphasis added) While the Roundtable supports creating disclosures that are "reasonably understandable" (a standard our members have met for 35 years), we strongly oppose the new second component of the proposed standard, "designed to call attention to the nature and significance of the information in the disclosure." How can creditors prove that their disclosures are "designed to call attention to the nature and significance of the information in the disclosure"? This component appears to go well beyond the stated purpose of the proposal and would require many additional steps to take place in order to comply with this requirement.

The proposed rules would place serious burdens on financial institutions with little benefit to consumers

Attempting to meet the higher "designed to call attention to" standard, as proposed, is unworkable and risky for financial institutions. The proposed rules would touch virtually every communication a financial institution has with a consumer, everything from advertisements, applications, monthly statements, ATM receipts, account agreements, and correspondence regarding credit decisions or disputes. This proposal would require institutions to undertake a comprehensive review of each and every one of their disclosure documents. Institutions would be required to revise all of these documents to comply with the higher standard for all of the Five Regulations. To protect against potential liability, institutions would need to act cautiously and judiciously by widening margins, increasing type sizes, adding new pages, and making numerous other changes

[2] 68 Fed. Reg. 75,164 (Dec. 30, 2003).

out of an abundance of caution. Institutions would need to discard or destroy large quantities of existing forms and materials. In addition, institutions would have to dedicate significant compliance personnel and legal and design staff to reviewing these documents. All of these actions would result significant burdens and costs to the industry.

For example, one financial institution that has receivables of approximately $13 billion and extends credit using nine different types of loans and sale credit in forty-two states identified 848 different forms that would be affected by this proposal. Those forms would need to be reviewed and revised at an estimated cost of between $700,000 and $1,100,000. Furthermore, making changes to those forms would preempt systems resources so that these compliance-mandated revisions would replace the rolling out of any new products, new or simplified forms, and other cost-saving or productivity initiatives for a considerable period of time. In addition, these forms would have to be maintained and scrutinized on an ongoing basis.

In addition to costs, there is no guarantee that changes to documents would protect an institution from potential liability. The proposed "clear and conspicuous" standards and corresponding examples are unclear and provide no safe harbor for financial institutions. Unlike Regulation P, consumers have a private right of action under the Five Regulations; therefore there is a large potential for liability. As a result, financial institutions would be exposed to a significant risk of liability and could be required to pay statutory damages even if the disclosures themselves are completely accurate, even if the consumer is not harmed, and even if the consumer does not detrimentally rely on the disclosures. Indeed, a financial institution could be liable for statutory damages if its disclosures were, by all reasonable measures, clear and conspicuous, but the institution could not prove that the forms were designed to call attention to either the nature of a single disclosure or its significance. In addition, violation of the Five Regulations may also give rise to liability under state unfair and deceptive practices statutes, which often adopted federal standards by reference. The potential exposure for all financial institutions under this proposal is exorbitant.

The examples proposed in the Commentary provide no safe harbor. The individual standards are unattainable and creditors would have to meet each and every one in order to be able claim good faith conformity with the regulation or Commentary. The Commentary standard for short sentences, using everyday words, and avoiding legal terms is "whenever possible." "Whenever possible" is an almost impossible standard to attain. If more than one "whenever possible" is missed, the standard has not been met. And, each of those "whenever possible" standards uses the word "and" to link it to the other enumerated standards, suggesting that financial institutions must meet every single criteria to qualify for a safe harbor.

Plaintiffs could endlessly second-guess financial institutions' decisions as to exactly what disclosure language must be called attention to and what methods are used to accomplish it and whether each or any of the "whenever possible" tests had been met. It is unclear

how different courts would read and apply these standards. The end result could be numerous lawsuits against financial institutions. This litigation would essentially recreate the litigation undertaken over the last thirty-five years to clarify the meaning of "clear and conspicuous." By conservative estimates, this prior litigation cost in the hundreds of millions of dollars, and its results have afforded lenders and consumers valuable legal protection by defining crucial legal boundaries. The Roundtable believes the proposed change to the "clear and conspicuous" standard would force the financial services industry and consumers to spend hundreds of millions of dollars to re-litigate these issues in the context of the correct interpretation of the new standard. At the same time, the proposed rule would compound these costs by erasing the value of decades of legal and regulatory precedent.

Finally, the proposed standards would provide no meaningful benefit to consumers. Over the past twenty years, the disclosures required by the Five Regulations have been modified and revised numerous times to ensure that the required disclosures are made in a clear and conspicuous manner taking into account the nature and significance of the information required to be disclosed. The regulatory standards in place today accomplish that goal. The Model Forms, which are part of the regulations, represent excellent regulatory efforts that incorporate design elements to call attention to the most significant required disclosures and balance all other competing interests and burdens. There simply is no groundswell of opinion calling for more clear and more conspicuous disclosures. Any incremental improvement to be gained from this proposal at best would be marginal.

In fact, Roundtable member companies believe that these standards will not even marginally improve any disclosures and will create additional documents that confuse consumers. The proposed standard would require additional pages, rearranging text, labeling data, and larger type sizes to assure that the financial institution has "called attention to" these disclosures. These steps would make the disclosures longer, more complex and harder to comprehend. There is no evidence that the higher "clear and conspicuous" standard for lengthy privacy disclosures set by Regulation P has enhanced consumer awareness. We do not believe that any increase in consumer awareness will be achieved with this proposal.

Conclusion

The member companies of the Roundtable strongly oppose the rules proposed by the Board. While we support the goal of providing "clear and conspicuous" disclosures to consumers, we believe that the Regulation P definition of "clear and conspicuous" is not an appropriate standard to be applied to the Five Regulations considered under this proposal. This standard adds a new element to the "clear and conspicuous" definition requiring documents to "call attention to the nature and significance of the information in the disclosure". This proposed change would require financial institutions, at considerable expense, to carefully scrutinize and redraft all documents and electronic pages that contain disclosures. The result would be enormous costs to financial institutions without any concomitant benefit to consumers. In addition, because the

standard is vague, the proposed rules would create longer, more confusing documents for consumers as companies struggle with compliance. Furthermore, since the rules are unclear and the standards set in the Commentary examples unattainable, there is no safe harbor protecting institutions from the many civil actions that could be brought against creditors under Five Regulations.

The member companies of the Roundtable strongly urge the Board to withdraw these proposed rules. If the Board wishes to proceed, we ask that it provide further opportunities to comment. If the rules are finalized, we urge the Board to give financial institutions more time than the six-month period currently proposed to implement these significant changes. Lead times for forms changes, especially those involving programming, are significant. Those lead times must be even longer when large numbers of forms must be changed.

If you have any further questions or comments on this matter, please do not hesitate to contact me or John Beccia at (202) 289-4322.

Sincerely,

Richard M. Whiting

Richard M. Whiting
Executive Director and General Counsel